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No. 95-2010

In the Supreme Court of the United States

OCTOBER TERM, 1995

EDWARD B. CROUSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals' decision should be vacated and remanded for further consideration in light of *Koon* v. *United States*, 116 S. Ct. 2035 (1996).

2. Whether a white collar defendant should be compared with others who commit the same kind of offense, rather than all criminal defendants, in deciding whether his civic contributions are atypical and therefore a permissible ground for a departure under the Guidelines.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 78 F.3d 1097. The opinion of the court of appeals in the prior appeal (Pet. App. 17a-37a) is reported at 38 F.3d 832.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1996. A petition for rehearing was denied on April 30, 1996. The petition for a writ of certiorari was filed on June 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Western District of Michigan to one count of shipping adulterated orange juice in interstate commerce, in violation of 21 U.S.C. 331(a) and 333(b) (1982) (recodified after the date of petitioner's offense as 21 U.S.C. 333(a)(2)). Pet. App. 21a. Petitioner was sentenced to probation, with a 12-month term of home confinement as a condition of probation. Petitioner was also assessed a $250,000 fine. The court of appeals vacated the sentence and remanded for resentencing. On remand, the district court sentenced petitioner to 18 months' imprisonment. *Id.* at 3a, 26a, 17a-37a. The court of appeals affirmed. *Id.* at 1a-11a.

1. Petitioner was the owner, former chief executive officer, and chairman of the board of Peninsular Products Co. (Peninsular), a manufacturer and distributor of orange juice. Pet. App. 19a. Peninsular manufactured what it claimed was pure orange juice from concentrate. *Id.* at 19a-20a. Under the Food, Drug, and Cosmetic Act, it is unlawful to add sugar, preservatives, or other similar additives to a beverage sold as orange juice from concentrate. *Id.* at 18a-19a. Beginning in 1979, however, Peninsular manufactured its purportedly pure orange juice from concentrate that consisted primarily of sugar and other additives designed to conceal the presence of sugar. *Id.* at 21a. Peninsular obtained the concentrate from Flavor Fresh Foods Inc. (Flavor Fresh). *Id.* at 19a. Flavor Fresh and its owners were knowing participants in the scheme. *Id.* at 19a-21a.

Peninsular also sought to extend the shelf life of its orange juice without having to invest in the new

equipment and better maintenance practices necessary to achieve such a result lawfully. Pet. App. 20a. To accomplish that goal, Peninsular purchased from Fred Kohlbach a potent and undetectable preservative. *Ibid.* Peninsular also purchased from Kohlbach machinery that enabled the surreptitious injection of the preservative into the juice. *Ibid.* By using Kohlbach's preservative, Peninsular was able to increase the shelf life of its juice and avoid the losses that its competitors experienced. *Ibid.* Peninsular's use of adulterants continued until 1991, when a Food and Drug Administration (FDA) inspector uncovered Peninsular's unlawful practices. *Id.* at 21a.

Although petitioner owned Peninsular, he was not active in the day-to-day management of the firm, having delegated that responsibility to the company's president, Wayne Wagoner. Pet. App. 19a. Nonetheless, petitioner was a full participant in the scheme to defraud. *Id.* at 19a-20a. He made the decision that Peninsular would use Flavor Fresh's sugared concentrate in manufacturing its purportedly pure juice. C.A. App. 107-108. Petitioner also authorized the use of Kohlbach's preservative and the purchase of Kohlbach's injection system. *Ibid.* When there was a threat that a competitor might inform the FDA of Peninsular's adulteration practices, petitioner attempted to insulate himself from liability by resigning as chief executive officer and naming Wagoner as his replacement. *Id.* at 106-107. Petitioner derived more than $1 million in income from Peninsular during the course of the conspiracy. Pet. App. 31a.

2. Petitioner was charged in a 33-count indictment relating to his role in Peninsular's scheme. Pet. App. 18a. Pursuant to a plea agreement, petitioner pleaded

guilty to a single count of shipping adulterated orange juice in interstate commerce, in violation of 21 U.S.C. 331(a) and 333(b) (1982) (recodified after the date of petitioner's offense as 21 U.S.C. 333(a)(2)). Pet. App. 21a. The effect of that agreement was to limit the maximum term of imprisonment petitioner faced to three years. See 21 U.S.C. 333(a)(2).

Before petitioner's sentencing, the district court received numerous letters attesting to petitioner's good character and his many civic and charitable contributions. Pet. App. 25a-26a. Petitioner also supplied the district court with information concerning the business losses that he suffered once Peninsular's crimes were made public. *Id.* at 26a.

In sentencing petitioner, the district court determined that his offense level under the Sentencing Guidelines was 19, which resulted in a Guidelines range of 30 to 37 months' imprisonment. Pet. App. 26a-28a. The district court stated that it was departing downward by six levels, and it sentenced petitioner to probation, with a one-year term of home confinement as a condition of probation. *Id.* at 2a, 28a. At the time of petitioner's sentencing, a person, such as petitioner, who was in Criminal History Category I was not eligible for a sentence of probation for an offense level greater than six. Guidelines § 5C1.1 (1987). The district court therefore effectively departed downward by 13 levels. Pet. App. 2a. The district court gave three justifications for the departure: (1) petitioner's extensive civic and charitable contributions; (2) petitioner's business losses; and (3) petitioner's relative culpability compared to others involved in the scheme. *Id.* at 2a, 26a. As part of the plea agreement, petitioner also paid a $250,000 fine. *Id.* at 26a.

3. The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 17a-37a. Applying a de novo standard of review, the court of appeals rejected each of the grounds relied upon by the district court as a justification for sentencing petitioner outside his Guidelines range. *Id.* at 25a-31a. The court concluded that petitioner's community service activities did not place him outside the heartland of similar offenders. *Id.* at 29a-31a. The court explained that "it is *usual* and *ordinary*, in the prosecution of similar white-collar crimes involving high-ranking corporate executives such as [petitioner], to find that a defendant was involved as a leader in community charities, civic organizations, and church efforts." *Id.* at 29a. The court rejected the district court's reliance on business losses as a ground for departure, noting that the evidence did not show that petitioner suffered significant losses and that, in any event, "it is not unusual that a business built in significant part on fraud will suffer once the fraud stops." *Id.* at 26a n.5. Finally, the court concluded that the district court had already adequately taken into account petitioner's relative culpability by giving petitioner a two-level enhancement for his role in the offense under Guidelines § 3B1.1(c). Pet. App. 27a n.6.

4. Before his resentencing, petitioner presented additional evidence on his civic and charitable achievements. Pet. App. 3a-4a. At his resentencing hearing, petitioner also called four witnesses to testify about his contributions to the community. *Id.* at 4a. Relying on the court of appeals' mandate and the law of the case doctrine, the district court concluded that petitioner's additional evidence did not justify a downward departure. *Ibid.* With the govern-

ment's acquiescence, the district court departed downward by four levels to reflect the 12 months that petitioner already had spent in home confinement, *id.* at 12a-15a, and sentenced petitioner to 18 months' imprisonment, *id.* at 15a.

5. The court of appeals affirmed. Pet. App. 1a-11a. The court of appeals held that neither its mandate nor the law of the case doctrine precluded the district court from considering petitioner's request to depart downward based on his community service. *Id.* at 5a-6a. The court concluded, however, that the district court's refusal to consider petitioner's request was not reversible error, because, "[e]ven after the district court let [petitioner] put on additional testimony concerning his community service, it was and is still evident that he did not qualify for the reduction." *Id.* at 7a. The court explained that, although petitioner's new testimony "tends to reflect that his community service was above average even for a corporate executive," the court could say "with confidence" that petitioner's community service was not "highly unusual for a person in his position." *Id.* at 8a.

Petitioner filed a petition for rehearing, arguing for the first time that the court of appeals erred in exercising de novo review over the district court's departure decision. Pet. 10 & n.12. The court of appeals denied rehearing.

ARGUMENT

1. Petitioner contends (Pet. 11-15) that, because the court of appeals exercised de novo review over the district court's decision to depart downward from the applicable Guidelines range, the Court should grant certiorari, vacate the judgment below, and remand for further consideration in light of *Koon* v. *United*

States, 116 S. Ct. 2035 (1996). Although the court of appeals exercised de novo review over the district court's decision to depart, Pet. App. 29a, and *Koon* holds that departure decisions must be reviewed under an abuse of discretion standard instead, 116 S.Ct. at 2046-2048, this case need not be vacated and remanded for further consideration in light of *Koon*. The district court in this case abused its discretion in awarding a downward departure based on petitioner's civic contributions, business losses, and relative culpability. Thus, even though the court of appeals considered the district court's departure decision under the wrong standard of review, it correctly reversed that decision.

a. The Guidelines discourage departures based on civic or charitable contributions. Guidelines §§ 5H1.16, 5H1.11. Under *Koon*, a court may depart based on such discouraged factors only if they are "present to an exceptional degree or in some other way make[] the case different from the ordinary case where the factor is present." 116 S. Ct. at 2045. Petitioner's showing that he engaged in significant charitable and civic contributions was insufficient to satisfy that standard. As the court of appeals concluded, "it is not unusual for white collar executives to have a record of substantial community contributions." Pet. App. 7a-8a.

As the court of appeals suggested (Pet. App. 7a-8a), the district court would have had discretion to depart based on petitioner's civic and charitable contributions if petitioner had shown that his activities were exceptional for a corporate executive. Petitioner failed to make that showing. As the court of appeals explained, although petitioner's civic and charitable contributions were "above average" for a

corporate executive, it could say "with confidence" that they were not "highly unusual for a person in his position." Pet. App. 8a. The district court therefore abused its discretion in relying on petitioner's civic and charitable contributions as a basis for a downward departure.

The court of appeals' conclusion that petitioner's civic contributions may not serve as a basis for departure is similar to the Court's holding in *Koon* that job loss is not a permissible ground for a departure in cases involving public officials who use governmental authority to violate personal rights. 116 S. Ct. at 2052. Just as job loss is not an unusual factor in a case involving governmental officials who violate the rights of others, *ibid.*, significant civic and charitable contributions are not unusual factors in a case involving white collar offenders like petitioner.

b. The district court also abused its discretion in relying on petitioner's business losses as a departure ground. The evidence shows that the value of Peninsular was unaffected by public disclosure of its unlawful conduct. Pet. App. 26a n.5. In any event, as the court of appeals noted, "[i]t is not unusual that a business built in significant part on fraud will suffer once the fraud stops." *Ibid.* Thus, even if petitioner had demonstrated significant business losses, the district court could not have departed on that ground. *Koon*, 116 S. Ct. at 2052.

c. The district court similarly abused its discretion in relying on petitioner's culpability relative to his co-defendants as a ground for departure. Guidelines § 3B1.1 already takes that factor into account by adjusting a defendant's offense level based on his role in the offense. See Guidelines § 3B1.1, comment. ("This adjustment is included primarily

because of concerns about relative responsibility.") Under *Koon*, it is an abuse of discretion for a district court to depart based on a factor that the Guidelines already take into account. 116 S. Ct. at 2052-2053. Further examination of that issue is not warranted.

2. Petitioner contends (Pet. 16-22) that, in evaluating whether petitioner's civic and charitable contributions were unusual, the court of appeals erred in comparing petitioner only to others who commit the same type of offense. In petitioner's view, his activities should have been compared to all offenders. The Guidelines, however, authorize a departure from the prescribed sentencing range only if a case falls outside the "heartland" of "typical cases embodying the conduct that each guideline describes." Sentencing Guidelines, Ch. 1, Pt. A(4)(b) (Policy Statement). If a defendant is typical of those covered by a particular Guideline, he falls within the "heartland" and is not eligible for a departure. Consistent with that directive, this Court in *Koon* compared the defendants' supposedly atypical characteristics in that case to the characteristics of others covered by the same offense Guideline, not to all offenders. 116 S. Ct. at 2049-2050, 2052 (comparing victim provocation and job loss of the defendants to others covered by civil rights guideline). Petitioner's contention that he should receive a departure for his charitable activities, even if those activities were within a range typical of persons who have committed the same kind of offense, is therefore inconsistent with the approach outlined by the Sentencing Commission and with this Court's decision in *Koon*.

Petitioner contends (Pet. 16) that the court's decision in this case conflicts with *United States* v. *DeMasi*, 40 F.3d 1306, 1323-1324 (1st Cir. 1994), cert.

denied, 115 S. Ct. 947 (1995). That asserted conflict does not warrant review.*

In *DeMasi*, the district court awarded a departure to a bank robber on the ground that his community service was atypical for a bank robber. The court of appeals reversed, holding that the district court had erred in restricting the scope of its comparison to bank robber cases. 40 F.3d at 1324. The court stated that "[a] court should survey those cases where the discouraged factor is present, without limiting its inquiry to cases involving the same offense, and only then ask whether the defendant's record stands out from the crowd." *Ibid.*

DeMasi, however, did not confront a situation similar to this one, in which the characteristic on which the defendant relied to support a departure is likely to be present in many, if not most of the cases covered by the offense guideline. If confronted with such a case, the First Circuit might well hold that a departure would not be appropriate unless the defendant's activities were exceptional when compared to other defendants who commit the same offense. Indeed, the First Circuit has applied that approach in somewhat similar circumstances. See *United States* v. *Rivera*, 994 F.2d 942, 955-956 (1st Cir. 1993) (embezzlement guideline takes into account "normal restitution needs and practicalities," although special circumstances may warrant a departure); *United States* v. *Citro*, 938 F.2d 1431, 1439-1440 (1st Cir. 1991) (comparing defendant's claim of addiction as basis for departure to other drug traffickers), cert. denied, 502

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* The Court denied review of the same issue in *United States* v. *Haverstat*, 22 F.3d 790 (8th Cir. 1994), cert. denied, 116 S. Ct. 671 (1995).

U.S. 1044 and 504 U.S. 931 (1992); *United States* v. *Aguilar-Pena*, 887 F.2d 347, 350 (1st Cir. 1989) (stating that the correct inquiry is whether there is "something 'special' about a given offender, or the accouterments of the crime committed, which distinguishes the case from the mine-run for that offense."). In addition, *DeMasi* was decided before this Court issued its decision in *Koon*, in which the Court compared the claims of the defendants to other defendants who commited the same kind of offense. The First Circuit may well reevaluate *DeMasi* in light of *Koon*.

In any event, the question whether a defendant should be compared to persons who have committed the same offense, all defendants, or both, is a question of Guidelines interpretation. Any inconsistency between the circuits on that issue is best resolved by the Sentencing Commission, rather than this Court. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991); see also *Koon*, 116 S. Ct. at 2051 (noting that Commission has assumed that its role is to revise the guidelines to specify departure factors and that Congress did not clearly direct the courts to supervise "the Commission's treatment of departure factors," and concluding that "we will not assume that role").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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